
STATE OF MONTANA,

Plaintiff and Appellee,

v.

LINDA KAPSA,

Defendant and Appellant.

ANDERS BRIEF

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Susan P. Watters, Presiding

APPEARANCES:

JOHNNA K. BAFFA
Attorney at Law
P.O. Box 7575
Missoula, MT 59807

ATTORNEYS FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

DENNIS PAXINOS
Yellowstone County Attorney
P.O. Box 35025
Billings, MT 59107-5025

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ISSUE PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
STANDARD OF REVIEW	9
ARGUMENT	10
I. UNDERSIGNED COUNSEL SHOULD BE PERMITTED TO WITHDRAW FROM DEFENDANT/APPELLANT’S APPEAL IN ACCORD WITH MONT. CODE ANN. § 46-8-103(2) AND <i>ANDERS</i>	10
II. THE RECORD MIGHT ARGUABLY SUPPORT CERTAIN APPELLATE ISSUES.....	12
A. Appellant May Wish to Assert That the Sentence and Probation Conditions Were Illegal and Unreasonable	12
B. Appellant May Wish to Assert That She Was Denied Effective Assistance of Counsel Because Her Lawyer Failed to Investigate Her Case and Failed to Call Certain Witnesses	18
CONCLUSION	22
CERTIFICATE OF SERVICE	23
CERTIFICATE OF COMPLIANCE.....	24
APPENDIX	25

TABLE OF AUTHORITIES

CASES

Anders v. California, 386 U.S. 738 (1967)	1, 10, 11
Haden v. State, 1999 MT 8, 293 Mont. 60, 973 P.2d 233	22
Hardin v. State, 2006 MT 272, 334 Mont. 204, 146 P.3d 746	10
McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429 (1988)	11
State v. Ashby, 2008 MT 83, 342 Mont. 187, 179 P.3d 1164	12
State v. Bateman, 2004 MT 281, 323 Mont. 280, 99 P.3d 656.....	18
State v. Hendricks, 2003 MT 223, 317 Mont. 177, 75 P.3d 1268	18
State v. Jefferson, 2003 MT 90, 315 Mont. 146, 69 P.3d 641.....	20, 21
State v. Kotwicki, 2007 MT 17, 335 Mont. 344, 151 P.3d 892.....	9, 12
State v. Kougl, 2004 MT 243, 323 Mont. 6, 97 P.3d 1095.....	18, 19, 21
State v. Lessard, 2008 MT 192, 36, 344 Mont. 26, 185 P.3d 1013	12
State v. Stiles, 2008 MT 390, 347 Mont. 95, 197 P.3d 966.....	passim

TABLE OF AUTHORITIES (Cont.)

State v. Turnsplenty, 2003 MT 159, 316 Mont. 275, 70 P.3d 1234	19
State v. Upshaw, 2006 MT 341, 335 Mont. 162, 153 P.3d 579	19, 22
State v. White, 2001 MT 149, 306 Mont. 58, 30 P.3d 340.....	19, 20
Strickland v. Washington, 466 U.S. 668 (1984)	10

OTHER AUTHORITIES

Montana Code Annotated

§ 45-8-217.....	1, 15
§ 46-12-211(1)(b).....	1, 13
§ 46-18-222.....	2, 4
§ 46-18-222(2).....	15
§ 46-18-501.....	15
§ 46-18-502.....	15
§ 46-18-502 (2009)	15
§ 46-8-103(1).....	1
§ 46-8-103(2).....	10

Montana Constitution

Art. II, § 24	18
---------------------	----

United States Constitution

Amend. VI	18
Amend. XIV	18

Yellowstone County Ordinances

4380-120	1
4380-130	1

INTRODUCTION

Upon conscientious examination of the record below, counsel hereby advises this Court that Defendant/Appellant, Linda Kapsa (Kapsa) can present no non-frivolous challenges to her conviction or sentence on direct appeal. The undersigned counsel thus moves this Court to allow counsel to withdraw from representation of Kapsa on appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and Mont. Code Ann. § 46-8-103(1).

ISSUE PRESENTED

Whether the undersigned counsel should be permitted to withdraw from Defendant/Appellant Kapsa's appeal in accord with the criteria established by the United States Supreme Court in *Anders*.

STATEMENT OF THE CASE

Kapsa was charged with two felony counts of Aggravated Animal Cruelty in violation of Mont. Code Ann. § 45-8-217, two misdemeanor counts of Dog At Large in violation of Yellowstone County Ordinance 4380-130, and two misdemeanor counts of Failure to Provide Rabies Information in violation of Yellowstone County Ordinance 4380-120. (D.C. Doc. 5.)

Kapsa and the State soon entered into a modified (1)(b) plea agreement pursuant to Mont. Code Ann. § 46-12-211(1)(b). Under that agreement, the State agreed to recommend that Kapsa be committed to Department of Health and

Human Services (DPHHS) for twenty years, all suspended and that she only be allowed to possess six altered companion dogs. (D.C. Doc. 130.) Although Kapsa had been designated a Persistent Felony Offender (PFO), subjecting her to up to 100 years in prison, the first five years of which could not be suspended, the State agreed to apply the Mont. Code Ann. § 46-18-222 PFO exception, allowing for a suspended sentence. (D.C. Doc. 130.) The agreement also provided Kapsa could possess up to forty chickens, twenty goats, three altered cats, eight horses, and two cockatiels and that Kapsa could argue for a shorter probationary period and to possess up to twenty unaltered dogs.

The district court accepted Kapsa's plea of nolo contendere pursuant to the plea agreement and held a sentencing hearing on July 9, 2009. At sentencing, the State argued consistent with its plea agreement. (8/11/09 Tr. at 18-29.) Kapsa argued for a shorter sentence and to be allowed to keep twenty dogs, two pairs of which could be unaltered. (8/11/09 Tr. at 110-13.) After hearing testimony, reviewing the various mental health evaluations, and considering the pre-sentence report, the judge fashioned a sentence consistent with the recommended term of years, but changed the conditions relevant to animals. (D.C. Doc. 156.)

The court committed Kapsa to twenty years at DPHHS, all suspended. (D.C. Doc. 156.) The suspension was conditioned upon Kapsa's possession of only three altered dogs (rather than six or twenty), three altered cats, twenty

chickens (rather than forty), ten goats (rather than twenty), eight horses, and two cockatiels. (D.C. Doc. 156.) The court filed its Judgment and Order Suspending Sentence on September 14, 2009, outlining its reasons for the sentence. Kapsa promptly appealed.

STATEMENT OF THE FACTS

In December 2008 Kapsa was charged by information with several counts related to her operation of a small farm and dog breeding operation, specifically: Count I Aggravated Animal Cruelty, a felony; Count II Aggravated Animal Cruelty, a felony; Count III Dog At Large, a misdemeanor; Count IV, Dog At Large, a misdemeanor, Count V Failure to Provide Rabies Information, a misdemeanor, and Count VI, Failure to Provide Rabies Information, a misdemeanor. (D.C. Doc. 5.) Soon after, the State filed its Notice of Intent to Have Defendant Designated a Persistent Felony Offender based on a 2004 plea of guilty to the offense of Issuing a Bad Check. (D.C. Doc. 10.)

By May, defense counsel Moira Murphy D'Alton and David Duke filed a Combined Notice to Rely Upon Defense of Mental Disease or Defect and Motion to File Psychological Assessment Under Seal. (D.C. Doc. 50.) Both a psychological assessment and supplemental psychological assessment were filed under seal a few days later. (D.C. Docs. 55, 58.) Following a June 30, 2009 competency hearing, district court Judge Susan Watters issued the court's Findings

of Fact, Conclusions of Law and Order finding defendant Kapsa competent to stand trial. (D.C. Doc. 128.)

In July, the State, Kapsa, her defense counsel, and her civil attorney, Elizabeth Hornaker signed a plea agreement, stipulating that in exchange for Kapsa's plea of nolo contendere on one count of Aggravated Animal Cruelty, the State would move to dismiss the remaining counts. (D.C. Doc. 130.) The State agreed to recommend to the court at sentencing that Kapsa received twenty years commitment to DPHHS, with all time suspended. (D.C. Doc. 130.) Additionally, the State would recommend that due to Kapsa's mental condition at the time of the offense, the Mont. Code Ann. § 46-18-222 exception to the PFO requirement be applied, allowing for a suspended sentence. (D.C. Doc. 130.)

The plea agreement also provided that the State would recommend at sentencing that Kapsa not possess more than six altered companion dogs. (D.C. Doc. 130 at 5.) Kapsa would then be allowed to argue for a shorter probationary sentence and for possession of up to twenty unaltered dogs. (D.C. Doc. 130 at 4.) Additional conditions of the plea agreement, set out in Section M, were that Kapsa not be allowed to keep more than forty chickens, twenty goats, three altered cats, eight horses, and two cockatiels. (D.C. Doc. 130 at 5.)

By signing the plea agreement, Kapsa also agreed to section N, which provided that the agreement was a "modified (1)(b) agreement, where the Court is

bound only by the maximum term of years that may be imposed.” (D.C. Doc. 130 at 5.) The agreement further explains that only if the “Court rejects the agreement with regard to term of years, [Kapsa] will be entitled to withdraw her guilty plea as a matter of law.” (D.C. Doc. 130 at 6.)

Additionally, Section G of the document outlined the waiver of Kapsa’s right to appeal any finding of guilt, adverse pre-trial ruling, State Post-Conviction relief, or Federal Habeus Corpus relief should a Montana Supreme Court appeal be unsuccessful. (D.C. Doc. 30 at 3.)

At the change of plea hearing, the district court judge reviewed each of the agreement’s provisions with Kapsa. (7/9/09 Tr. at 5-8.) Kapsa was asked if she understood that by signing the plea agreement she waived certain rights and was subject to both collateral consequences and standard and additional conditions of probation. (7/9/09 Tr. at 5-7.) Kapsa responded “yes.” (7/9/09 Tr. at 5-7.) Kapsa was also reminded that the plea agreement set out how many of each type of animal she would be allowed to keep, specifically that the State would argue she be allowed to keep six altered companion dogs, but that she could argue to keep twenty unaltered dogs. (7/9/09 Tr. at 5-7.)

Additionally, the judge specifically asked the following:

The Court: Do you understand that this is a modified 1(b) agreement, meaning that pursuant to this agreement, the State is bound by its maximum recommendation of 20 years, however your counsel can argue for a lesser sentence?

Kapsa: Yes.

The Court: And that if I were to determine that the terms of the sentence, including the maximum years was not sufficient, that you could withdraw your nolo contendere plea, do you understand that?

Kapsa: Yes.

The Court: Well, apparently the term of years is the only term that if I were to determine that that was not sufficient, that then you would be allowed to withdraw your guilty plea. If I determine other terms are not appropriate, that doesn't give you the right to withdraw your nolo contendere plea, do you understand that?

Kapsa: Yes.

The Court: Okay. And I'm reading that from the top of page 6. You've gone all through this agreement with your counsel, correct?

Kapsa: Yes.

(7/9/09 Tr. at 8.)

As Kapsa had formerly made a claim of incompetency to stand trial, the court required she withdraw her claim and unequivocally affirm her competency.

(7/9/09 Tr. at 9.) The judge also noted its previous finding that Kapsa was competent. (7/9/09 Tr. at 10.) The court nevertheless asked Kapsa if she was suffering any mental or emotional disability that would prevent her from understanding what she was doing, and if she understood that ramification and consequences of her plea. (7/9/09 Tr. at 10.) Kapsa again responded in the affirmative. (7/9/09 Tr. at 10.) Kapsa also consented that she was making the plea voluntarily, knowingly, and intelligently. (7/9/09 Tr. at 10.)

Following the State's offer of proof, the court made further efforts to ensure Kapsa was aware of her actions, asking her if she was "satisfied with the services and advice of [her] attorneys in the matter." (7/9/09 Tr. at 20.) Kapsa responded, "somewhat," but confirmed that she had also reviewed the plea agreement with her civil attorney, Ms. Honaker, with whom she has complete confidence. (7/9/09 Tr. at 20.) Although Kapsa expressed frustration that she never got all the evidence she asked for from her counsel, she nevertheless agreed that she wanted to proceed with her plea of nolo contendere. (7/9/09 Tr. at 22.) The case was set for sentencing.

On August 11, 2009, the parties reconvened for a sentencing hearing. The State called two witnesses to testify regarding restitution. (8/11/09 Tr. at 5, 12.) The defense also called two witnesses. Ms. Honaker testified about her opinion on restitution in this case generally and Kapsa's limited budget. (8/11/09 Tr. at 45-46.) Kapsa also testified, indicating her desire for a shorter probationary sentence and increased number of allowable animals. (8/11/09 Tr. at 34, 63.)

Defense counsel argued that Kapsa be allowed to keep twenty dogs, consisting of two unaltered pairs. (8/11/09 Tr. at 111-12.) He also noted the inconsistency between the special conditions outlined in the plea agreement and those in the pre-sentence report. (8/11/09 Tr. at 113.) The State clarified that as the probation officer disagreed with the plea agreement, which allowed Kapsa to

maintain forty chickens and twenty goats, the presentence report recommended she only be allowed twenty chickens and ten goats. (8/11/09 Tr. at 114.) Kapsa's counsel argued that the extra chickens and goats were necessary to supplement not only Kapsa but her dogs with eggs, milk, and meat. (8/11/09 Tr. at 113.)

After considering the contents of the pre-sentence report, the testimony and defendant's statements at the sentencing hearing, mental health evaluations, sentencing memorandums, and statutory criteria, the court rendered its sentence, detailing its reasons. (D.C. Doc. 156.)

The court did not allow Kapsa to keep the numbers of animals she desired, citing the court's "great concern that [she] is unable to recognize the need to provide adequate care for animals." (D.C. Doc. 156.) Specifically, the court noted that Kapsa's criminal record indicated a history of hoarding animals evident from a 1993 case where over 300 animals were seized from her property. (D.C. Doc. 156.)

The court reminded Kapsa that the court had authority to adjust the number of animals Kapsa was allowed to possess. (8/11/09 Tr. at 128.) Although the plea agreement set out the numbers of chickens, goats, cats, horses, and cockatiels Kapsa could have, the plea agreement was only binding upon the court with regard to the term of years to which Kapsa could be sentenced, that is, up to twenty years.

(8/11/09 Tr. at 128.) The plea agreement “did not bind the Court with regard to the number of animals that [she] could have in [her] possession.” (8/11/09 Tr. at 129.)

The court rejected both the State’s argument for six and Kapsa’s argument for twenty dogs, instead allowing Kapsa to possess only three altered companion dogs. (8/11/09 Tr. at 129.) As the total number of dogs Kapsa would have was reduced, the court reasoned that the number of chickens and goats necessary to supplement their dietary needs was also reduced. (8/11/09 Tr. at 129.)

In the end, Kapsa was committed to the DPHHS for twenty years, all suspended on several conditions, including that she possess no more than three altered companion dogs, twenty chickens, ten goats, three altered cats, four horses, and two cockatiels. (D.C. Doc. 156.)

Kapsa timely filed a Notice of Appeal.

STANDARD OF REVIEW

A criminal sentence is reviewed for “legality only; that is, whether the sentence falls within the statutory parameters.” *State v. Kotwicki*, 2007 MT 17, ¶ 5, 335 Mont. 344, 151 P.3d 892.

This Court employs a dual standard of review of probation conditions; first, it reviews de novo review the legality of the probation conditions, and then reviews the conditions’ reasonableness for an abuse of discretion. *State v. Stiles*, 2008 MT 390, ¶ 7, 347 Mont. 95, 197 P.3d 966.

To prove an ineffective assistance of counsel claim, the defendant must meet both prongs of the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the *Strickland* test, the defendant must show his counsel's performance was deficient and the deficient performance prejudiced him. *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d 746.

ARGUMENT

I. UNDERSIGNED COUNSEL SHOULD BE PERMITTED TO WITHDRAW FROM DEFENDANT/APPELLANT'S APPEAL IN ACCORD WITH MONT. CODE ANN. § 46-8-103(2) AND *ANDERS*.

In *Anders*, the United States Supreme Court concluded that when appellate counsel, after conscientious examination of the record, finds the case to be wholly frivolous, counsel should advise the court and move to withdraw. *Anders*, 386 U.S. at 744. The request to withdraw must be "accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744.

Montana law also requires counsel to file a motion to withdraw in such circumstances. Mont. Code Ann. § 46-8-103(2). Under the statute, the appellate attorney must also state that she found the appeal frivolous only after "reviewing the entire record and researching applicable statutes, case law, and rules and that the defendant has been advised of counsel's decision and of the defendant's right to file a response." Mont. Code Ann. § 46-8-103(2). The appellate attorney must,

then, file a memorandum of potential issues. Mont. Code Ann. § 46-8-103(2).

This brief addresses those potential matters.

However, a dilemma arises between the movant's duty of diligence to her client and duty of candor before the court. The United States Supreme Court addressed this dilemma as follows:

We interpret the discussion rule [of *Anders*] to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with 'notice' that there are facts on record or cases or statute on point which would seem to compel a conclusion of no merit.

McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429, 440 (1988).

Thus, the appellate defender must walk that fine line between advocacy and diligence wherein thorough research is the undoing of her client's appeal. Here, the undersigned is compelled by her duty of candor before the Court in accord with *Anders* to provide this Court with notice that diligent research has yielded just such a result. No non-frivolous issues are present in this appeal.

II. THE RECORD MIGHT ARGUABLY SUPPORT CERTAIN APPELLATE ISSUES.

A. Appellant May Wish to Assert That the Sentence and Probation Conditions Were Illegal and Unreasonable.

A sentence is illegal only when it exceeds the statutory parameters for a particular offense. *Kotwicki*, ¶ 5. While a district court may neglect to abide by certain statutory requirements resulting in an objectionable sentence, that sentence is nevertheless legal. *Stiles*, ¶ 11.

In addition to incarceration and fines, the sentencing court may apply statutory conditions and special conditions that are reasonable and “considered necessary for rehabilitation or for the protection of the victim or society.” *Stiles*, ¶ 10. This Court has “referred to probation conditions that lack a nexus to the offense or the offender as illegal.” *Stiles*, ¶ 10 (*citing State v. Lessard*, 2008 MT 192, ¶ 27, 36, 344 Mont. 26, 185 P.3d 1013). For the conditions to be reasonable and proper there must be a nexus between the conditions and the offense or offender. *Stiles*, ¶ 10. The court may only impose offender-related conditions when the offender’s “history or pattern of conduct to be restricted is recent, significant, or chronic.” *Stiles*, ¶ 10 (*citing State v. Ashby*, 2008 MT 83, ¶ 15, 342 Mont. 187, 179 P.3d 1164).

In *Stiles*, the Court struck a probationary condition as illegal because there was no nexus between *Stiles* and the condition. *Stiles*, ¶ 16. Following *Stiles*’s

conviction of felony theft of a Chevrolet Monte Carlo Intimidator, he was sentenced to fifteen years at the Montana State Prison, with five years suspended. *Stiles*, ¶¶ 4-5. One of his probation conditions was that he “not possess or consume intoxicants/alcohol, nor will he enter any place intoxicants are the chief item of sale.” On appeal, Stiles argued there was no nexus between his theft offense and the condition prohibiting alcohol. *Stiles*, ¶¶ 4-5.

The State did not deny the lack of connection, but argued that the condition stand because “a clear relationship exist[ed] between substance abuse and recidivism” and “preventing Mr. Stiles from drinking and frequenting bars [would] enable him to more easily satisfy his restitution obligation.” *Stiles*, ¶ 14. This Court disagreed, finding that Stiles’s experiences with alcohol, although significant, were not recent. *Stiles*, ¶ 16. As “a court may impose offender-related conditions only when ‘the history or pattern of conduct to be restricted is recent, and significant or chronic,’” this Court found the condition “lacked sufficient nexus to Stiles and [was] improper.” *Stiles*, ¶ 16.

Kapsa and the State entered into a modified (1)(b) plea agreement pursuant to Mont. Code Ann. § 46-12-211(1)(b) which allows the parties to “agree that a specific sentence is the appropriate disposition of the case.” Kapsa’s agreement is modified by its Section N, which binds the district court only as to the number of years agreed upon in the agreement. (D.C. Doc. 130 at 5.) The court was then free

to construct probation conditions that were reasonable and necessary, provided that after hearing testimony and reviewing reports, it found a nexus between the condition and the offense or offender. *Stiles*, ¶ 10.

In the plea agreement, the State agreed to recommend to the court that Kapsa be sentenced to twenty years commitment to the DPHHS, with all time suspended, and that Kapsa be allowed to possess up to six altered companion dogs. (D.C. Doc. 130 at 4.) Section M of the agreement provided that Kapsa be limited to possessing no more than forty chickens, twenty goats, three altered cats, eight horses, and two cockatiels. (D.C. Doc. 130 at 5.) Kapsa was allowed to argue at sentencing for a shorter probationary sentence and to possess up to twenty unaltered companion dogs. (D.C. Doc. 130 at 4.)

Under this modified agreement, Kapsa would only be allowed to withdraw her guilty plea if the court sentenced her above the twenty-year term recommended by the State in the agreement. (D.C. Doc. 130.) Thus, she would not be allowed to withdraw her plea if the court decided to alter other terms of the agreement, such as number of animals she be allowed to possess. This was explained to Kapsa at both the change of plea hearing and sentencing hearing. (7/9/09 Tr. at 8; 8/11/09 Tr. at 129.)

Pursuant to the modified plea agreement, Kapsa pled nolo contendere to and was sentenced on the offense of Aggravated Animal Cruelty in violation of Mont.

Code Ann. § 45-8-217. (D.C. Doc. 156.) The statutory parameters for that offense are up to two years with the department of corrections and a \$2500.00 fine, Kapsa was sentenced as a PFO, pursuant to Mont. Code Ann. §§ 46-18-501 and -502. (D.C. Doc. 156.) Her possible sentence could range from five years to 100 years in the Montana State Women's Prison, the first five years of which could not be suspended. Mont. Code Ann. § 46-18-502 (2009). As Kapsa's mental condition at the time of the offense was impaired, she qualified for the Mont. Code Ann. § 46-18-222(2) exception which allowed the court to suspend her sentence. (D.C. Doc. 156.)

The court sentenced Kapsa within the modified plea agreement and the statutory parameters. She was committed to DPHHS for twenty years, all time suspended. Thus, she cannot withdraw her nolo contendere plea, nor is her sentence illegal under *Stiles*.

As the plea agreement was only binding as to the term of years recommended by the State, the court was not bound regarding the probationary conditions. The court followed the recommendations of the probation officer's pre-sentence report, which restricted Kapsa's animal count to twenty chickens (instead of forty) and ten goats (instead of twenty). (8/11/09 Tr. at 129.) As Kapsa could possess only three altered companion dogs instead of twenty, the court

reasoned that the number of chickens and goats necessary to supplement their dietary needs was also reduced. (8/11/09 Tr. at 129.)

The court based its conditions on Kapsa's history of hoarding animals and mental condition which affects her ability to appreciate the criminality of her actions. (8/11/09 Tr. at 129.) The court cited its "great concern that [Kapsa] is unable to recognize the need to provide adequate care for animals." (D.C. Doc. 156.) Specifically, Kapsa's criminal record indicated a history of animal hoarding evident from a 1993 case where over 300 animals were seized from her property. (D.C. Doc. 156.) Now, in 2008, the court reasoned, the State has intervened again upon finding nearly 200 animals on her property living in inappropriate conditions. (8/11/09 Tr. at 133.)

Significantly, Kapsa's mental health evaluations indicated a high potential for repeating that hoarding pattern due to antisocial behaviors, major depression, personality disorder, and maladaptive disorder. (8/11/09 Tr. at 125-126.) In the end, the court determined that Kapsa had a "history, whether intentional or not intentional, of accumulating large numbers of animals for which [she was] not able to provide sufficient care." (8/11/09 Tr. at 126-127.)

The court found that Kapsa's history and pattern of conduct was significant, necessitating probationary conditions "that will prevent [the same offense] from happening again." (8/11/09 Tr. at 127.)

The court also provided several reasons why its sentence and conditions were reasonable. Kapsa was committed to DPHHS rather than prison due to her “mental disease or defect that interfered with [her] ability to appreciate the criminality of [her] behavior and conform [her] behavior to the requirements of law.” (8/11/09 Tr. at 125.) The court crafted a sentence to address the mental health issues it believed caused Kapsa to be before the court, conditioning her suspended sentence on her participation in mental health treatment. (8/11/09 Tr. at 131.)

The court also considered Kapsa’s strong attachment to her animals in its sentence. (8/11/09 Tr. at 129.) The court reasoned that as the “sentence [was] designed to address [Kapsa’s] mental health issues,” and companion animals are good for mental health, Kapsa should be allowed three altered companion dogs of her choice. (8/11/09 Tr. at 129.) She would also be allowed three altered cats, two cockatiels, and her older horses. (8/11/09 Tr. at 130.) As she would have fewer dogs, the court reasoned Kapsa would need fewer chickens and goats. (8/11/09 Tr. at 129-30.) With an eye to Kapsa’s mental health, criminal history, risk of recidivism, and budget, the court reasoned that while Kapsa should be allowed to possess some animals, that number be judicially controlled. (8/11/09 Tr. at 130.)

B. Appellant May Wish to Assert That She Was Denied Effective Assistance of Counsel Because Her Lawyer Failed to Investigate Her Case and Failed to Call Certain Witnesses.

The Sixth Amendment of the United States Constitution, as incorporated through the Fourteenth Amendment, and Article II, Section 24, of the Montana Constitution guarantees a person the right to effective assistance of counsel. To evaluate claims of ineffective assistance of counsel, this Court has adopted a two-pronged test. *State v. Koughl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095.

This two-pronged test requires the defendant to establish that (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Koughl*, ¶ 11. There exists a strong presumption that counsel's performance was based on sound trial strategy that falls within the broad range of reasonable professional conduct. *State v. Hendricks*, 2003 MT 223, ¶ 7, 317 Mont. 177, 75 P.3d 1268 (citations omitted).

This Court is unable to determine whether counsel's actions were unreasonable when the record is silent as to the reasoning behind the allegedly deficient actions. Therefore, the Court distinguishes between record-based and non-record-based claims of ineffective assistance of counsel. *State v. Bateman*, 2004 MT 281, ¶ 23, 323 Mont. 280, 99 P.3d 656. Generally, to determine whether or not the claim is record-based, this Court asks "why" counsel did or did not

perform as alleged, and then seeks to answer the question by reference to the record. *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. For example, “if counsel fails to object to the admission of evidence, or fails to offer an opening statement, does the record fully explain *why* counsel took the particular course of action?” *State v. Turnsplenty*, 2003 MT 159, ¶ 17, 316 Mont. 275, 70 P.3d 1234.

Only where the record fully explains why counsel took, or failed to take, action in providing a defense for the accused may this Court review the matter on direct appeal. *Turnsplenty*, ¶ 17. If not, the proper action for this Court is to dismiss the direct appeal and allow the defendant to seek relief through a post-conviction hearing. *State v. Upshaw*, 2006 MT 341, ¶ 35, 335 Mont. 162, 153 P.3d 579. A post-conviction proceeding is more appropriate because “it permits a further inquiry into whether the particular representation was ineffective.” *Turnsplenty*, ¶ 17.

Sometimes the facts are such that it is unnecessary to ask “why” counsel acted or failed to act because the action is obligatory, and therefore clearly non-tactical. *Kougl*, ¶ 15. “Then the question is not ‘why’ but ‘whether’ counsel acted, and if so, if counsel acted adequately.” *Kougl*, ¶ 15. Although it is rare for there to be “no plausible justification” for counsel’s conduct, it happens, even in situations that are typically non-record based such as failure to offer a particular

jury instruction or advise a client of his options. *Kougl*, ¶ 15 (*citing White*, ¶¶ 18-19).

Such implausible actions include where defense counsel said during his opening statement that his client would tell the jury “that he is guilty, no doubt, of a partner/family member assault and perhaps felony assault,” but that the jury would still not find his client guilty of attempted deliberate homicide. Defense counsel also said during his closing statement that his client “no doubt” assaulted the victim and “no doubt” pointed a gun at her. *State v. Jefferson*, 2003 MT 90, ¶¶ 45-46, 315 Mont. 146, 69 P.3d 641. This Court noted that while the record did not reveal “any direct evidence” of why counsel made those statements, “there is no plausible justification for counsel’s conduct under these circumstances.” *Jefferson*, ¶¶ 45-46. This was true because counsel’s statement directly contravened the reason his client accepted the risk of a trial. Accordingly, counsel’s statements could not be considered a trial strategy or tactical decision. *Jefferson*, ¶ 50.

Kapsa may argue that her trial counsel, David Duke and Moira Murphy D’Alton, were ineffective because they failed to properly investigate her case by failing to interview witnesses identified by the defendant or failing to call certain witnesses at sentencing. While the lack of defense witnesses is apparent from the record, the reasoning behind their decision not to call witnesses--whether tactical

or accidental--is not. (D.C. Doc. 28 at 2; 5/29/09 Tr. at 98.) It is also not clear from the record to what extent Mr. Duke and Ms. D'alton investigated Kapsa's case and if they did not, the reason for that omission. As the reasons for Kapsa's counsel's inactions are not identifiable from the record, those issues cannot be raised on direct appeal unless there was "no plausible justification for his conduct under the circumstances. *See Jefferson*, ¶¶ 45-46; *Kougl*, ¶ 15.

Perhaps the only thing identifiable from the record is Kapsa's distrust of trial counsel. At the change of plea hearing, the court asked Kapsa if she was "satisfied with the services and advice of [her] attorneys in this matter." (7/9/09 Tr. at 20.) Kapsa responded, "somewhat." (7/9/09 Tr. at 20.) Indeed, she had her civil attorney, Ms. Honaker, review and sign the plea agreement with her prior to proceeding. (7/9/09 Tr. at 20.) She also expressed frustration with not getting all the evidence she had requested, but nevertheless agreed to move forward with her plea of nolo contendere. (7/9/09 Tr. at 22.)

Unlike in *Jefferson*, where trial counsel's statements directly undermined the defendant's attempt at an acquittal at trial, Mr. Duke's failure to call additional witnesses was not clearly implausible conduct. *Jefferson*, ¶ 50. Although not apparent from the record *why* he decided not to call certain witnesses, such conduct is not without some plausible justification.

Furthermore, as the tactical reasoning for Mr. Duke's alleged failure to investigate and call witnesses is non-record based, the issue cannot be raised on direct appeal. *Upshaw*, ¶ 33. In fact, because facts surrounding a claim of failure to investigate--such as failure to interview and call witnesses--are necessarily not on the record, such issues are generally not raised on direct appeal, but instead are more appropriate in a petition for post-conviction relief where a record regarding reasoning can be created. *Haden v. State*, 1999 MT 8, ¶ 28, 293 Mont. 60, 973 P.2d 233.

CONCLUSION

Kapsa's appeal is frivolous and this Court should grant the undersigned's motion to withdraw as counsel on direct appeal.

Respectfully submitted this ____ day of March, 2010.

By: _____
JOHNNA K. BAFFA
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

Anders Brief to be mailed to:

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

DENNIS PAXINOS
Yellowstone County Attorney
P.O. Box 35025
Billings, MT 59107-5025

LINDA KAPSA
2315 South 14th Road
Ballantine, MT 59006

DATED: _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

JOHNNA K. BAFFA

APPENDIX

Exhibit 1	Plea Agreement
Exhibit 2	Judgment and Order Suspending Sentence
Exhibit 3	Oral Pronouncement of Judgment and Sentence